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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ANDREW HEAFER FICKETT, Defendant and Appellant.	G049134 (Super. Ct. No. 11NF3406) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Carla Singer, Judge. Affirmed.

Law Offices of Ronald A. Ziff, Ronald A. Ziff and Abby Besser Klein for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, William M. Wood, Marilyn L. George and Adrianne Denault, Deputy Attorneys General, for Plaintiff and Respondent.

Thirty-one-year-old Andrew Heafer Fickett arranged to meet a 13-year-old girl, with whom he had been "chatting" in an online instant messaging forum and exchanging text messages via cellphone, with hopes of engaging in sexual conduct with her. As it turned out, the girl was an adult police officer posing as a child, and Fickett was arrested when he arrived for their assignation. Fickett appeals from his convictions for contacting or communicating with a minor with the intent to commit lewd conduct (Pen. Code, § 288.3, subd. (a)),[1] attempted lewd conduct with a child under age 14 (§§ 288, subd. (a), 664), and arranging a meeting with a minor to engage in lewd or lascivious behavior (§ 288.4, subd. (b)). Fickett contends statements he made to a police officer prior to his arrest were obtained in violation of *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*), and there was insufficient evidence to convict him under section 288.3, subdivision (a), because that crime requires there be an actual minor victim, whereas here he was communicating with a police officer, not an actual child victim. We reject his contentions and affirm his convictions.

FACTS & PROCEDURE

On October 24, 2011, Anaheim Police Department Officer Merisa Leatherman, a vice investigator, participated in a Yahoo Messenger online "chat" room posing as a 13-year-old girl named "Mandy." To comply with Yahoo's requirements that users be adults, Leatherman had previously set up an online "profile" using the alias "Amanda Smith," an 18-year-old living in Anaheim. Because user names generally suggest something about the person, Leatherman gave Mandy the user name "yungandfun13" to suggest she was only 13 years old. Mandy's online profile included an actual picture of Leatherman that had been age regressed to make her appear to be about 13 years old.

Beginning in the late afternoon, Leatherman, as Mandy, had two lengthy series of chats with a person who went by the user name "bendoverjohn," who was later

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[1] All further statutory references are to the Penal Code, unless otherwise indicated.

identified as Fickett (we hereafter generally refer to "bendoverjohn" as Fickett and "yungandfun13" as Mandy). The first chat session lasted from 3:48 p.m. until 5:45 p.m. The second exchange went from 6:32 p.m. until 7:35 p.m. Additionally, Leatherman, as Mandy, exchanged a series of text messages with Fickett. The content of the chats and text messages were downloaded and introduced into evidence. We discuss them in their original form, adding Leatherman's explanations where appropriate. Leatherman was trained to not initiate discussions about sex or "hook[ing] up," which could include "kissing, touching, oral sex, or sex," and usually responded to questions about sex or hooking up "with a question or curiosity."

The First Series of Chats

The first set of chats began when Mandy received an instant message from Fickett asking if she remembered him. Mandy asked for an "ASL" (age, sex, location). Fickett answered 31, male, from Hollywood, to which Mandy replied 13, female, from Anaheim. Fickett asked Mandy if she was "cool" with him "being 31." She replied "lol yea." They chatted about being bored and Fickett having a roommate who was never home so he pretty much lived alone. Eventually Fickett said, "it's too bad you can't come hang out." Mandy responded: "lol i knw . . i dnt drive lol." Fickett replied, "I wouldn't think you would at 13" and that "if you were a little closer I could just pick you up."

A few minutes later Fickett said to Mandy, "it would be kind of hot to meet someone younger though." Mandy replied, "lol like me?" and Fickett replied, "yeah" and then "maybe I'll have to come pick you up sometime." Mandy asked what they would do, and Fickett replied "it might be best if we just hung out at my place, might look a little strange if we were out in public together." He asked Mandy what she would tell her parents, and if she had a cellphone. Mandy responded she lived alone with her mother, and she had a cellphone but only for text messages. Fickett sent Mandy his cellphone number, telling her to "text anytime" and said his name was "Andrew." When Mandy told him her name, Fickett replied that "[M]andy's are usually pretty." Fickett sent Mandy a photo of

himself and asked Mandy for her photo. Leatherman sent him the age regressed photo of herself. Fickett replied that Mandy was pretty and "she looked a little bit older than 13, but not much."

A few minutes later, Fickett asked Mandy if she "still want[ed] to hang out sometime" and offered to pick her up that week. When Mandy asked what he wanted to do, Fickett replied "we could just hang out or do more if you like." Mandy asked "wht did u hav in min[d]" and Fickett replied, "I don't know, what do you have in mind." Fickett suggested they could "smoke weed" but he would not pressure Mandy to do so.

At this point, when Fickett and Mandy were about 40 minutes into their chat, the conversation became sexual in nature. Fickett asked Mandy "you ever hook up with a guy?" Mandy responded, "yeah" and "like made out with him lol." Fickett replied, "that's something . . . I might let you make out with me." Mandy said she did not have much experience, and Fickett responded: "everyone was a virgin at one point." He asked Mandy, "would you want to try anything else?" She asked, "like what?" Fickett responded: "touching . . . or oral." Mandy said, "iv nvr done that stuff . . is that ok?" Fickett said, "I'll let you practice on me." Mandy again asked, "wht wud u wnt me to do?" and Fickett responded she could "rub[] me and maybe even suck on it."

The messages thereafter continued to be sexual in nature, interlaced with mundane chit chat. Fickett asked Mandy if she wanted him to touch her, and if she had ever touched herself. He asked if she wore a bra, and if so what size, and what style underwear she wore, suggesting she could model them for him when they got together. Fickett said he could pick up Mandy the next day. Mandy responded, "my mom leaves for work at like 1030" and Fickett wrote, "so pic you up at 11?" Mandy said, "yeah! . . . yea sounds fun." Fickett told Mandy, "if you were here you could feel how excited I am." Mandy asked what that meant, and he replied, "I'm turned on I'm so excited." Mandy broke off the chat, saying she had to stop to eat dinner.

The Second Series of Chats

Fickett and Mandy resumed instant messaging at 6:32 p.m. Fickett asked if Mandy was "going to tell anyone about coming to my place tomorrow?" When she said, "no . . . are u?" Fickett replied, "nope . . . I'd like to stay out of jail." He said if he were to make out with her he would be breaking the law, so Mandy would have to be his "naughty little secret."

Fickett then sent Mandy several more messages that were sexual in nature. He asked Mandy if she "ever had an orgasm?" and said they would "work on that tomorrow." When Mandy asked how, Fickett responded he could "finger you or go down on you." Fickett asked Mandy several more questions about what might sexually arouse her. Eventually, he asked Mandy if she really would be there when he came to pick her up the next day. Mandy said he could pick her up at the 7-Eleven store near her house in Anaheim, "so neghbors dnt see." Mandy gave Fickett directions and told him to text her when he got there.

The Text Messages

While the instant messaging was going on, Fickett and Mandy also began sending intermittent text messages beginning at 5:32 p.m. Fickett texted: "I can't wait for tomorrow," and "I think I'm going to be turned on until tomorrow." Fickett also texted: "I can't wait for you to touch me, I think it's hot that it will be the first one for you to touch." He asked Mandy, "Have you been wanting to try more?" and repeated, "I can't wait for tomorrow," "I'm hard again thinking about it." The texting ended at 10:17 p.m. when Mandy said she was going to sleep. Fickett texted, "Yeah, I want you as soon as possible," and "Can't wait to see you and kiss you."

While "Mandy" was chatting and texting with Fickett, Leatherman had other officers help identify "benderoverjohn" and obtained his birth date (confirming he was 31 years old), photograph (matching the one "bendoverjohn" sent to Mandy) and address from

DMV records. Police planned to set up surveillance at Fickett's residence and follow him to the 7-Eleven parking lot in Anaheim.

The Next Morning

Text messages between Mandy and Fickett began in the morning on October 25, 2011. They discussed meeting at the 7-Eleven. Fickett texted Mandy he was excited and was thinking about her. At 11:34 a.m., Fickett texted he was in a silver Toyota Corolla with Texas license plates and would be at the 7-Eleven in about 10 minutes. Mandy texted back she was walking down to meet him.

Leatherman instructed two other police officers to contact and detain Fickett, and as she arrived at the 7-Eleven parking lot, they were doing so. Fickett gave police consent to search his car. After Leatherman located the series of text messages between Mandy and Fickett on Fickett's cellphone, Fickett was arrested.

Leatherman later researched her archive of Mandy's online chats and found a number of chats on different dates in May, July, and August between Mandy and "bendoverjohn." Leatherman testified Mandy told "bendoverjohn" she was 13 years old at least three times prior to the October 24, 2011, chats.

Parking Lot Interview

In response to Leatherman's call as she walked to the 7-Eleven to meet Fickett, Anaheim Police Officer Nathan Fay and Investigator Shane Carringer contacted Fickett, who was sitting in his car—a silver Corolla with Texas license plates—in the 7-Eleven parking lot. At Fay's request, Fickett got out of his car and sat on a nearby curb. Fickett consented to a search of his car.

A few minutes later Investigator Joseph Acuna, who had conducted surveillance on Fickett at his residence and followed him to Anaheim, arrived. Acuna's interview with Fickett was recorded and played for the jury at trial. Acuna identified himself as a police officer and told Fickett he was not under arrest, "we're just here to talk to you, get some information if you could help us out." Fickett said, "Okay."

Acuna moved Fickett away from the curb, and asked him his name and what brought him to Anaheim. Fickett said he had driven down from Hollywood to "hang out" with a girl named "Mandy" who he met online and who he believed was 15 years old. Acuna asked Fickett what kind of computer he used (a laptop), his username ("bendoverjohn"), and Mandy's user name ("yungandfun something"). Fickett said he had met Mandy online about a year earlier, and chatted with her occasionally. When Acuna asked about the nature of their relationship, Fickett initially denied talking about intercourse but admitted talking about kissing. Fickett admitted talking with Mandy about how she was "curious about some stuff" but denied talking about having sex or doing anything illegal.

Acuna asked Fickett who had access to his computer. Fickett said sometimes friends did. It was password protected, but he sometimes gave the password to friends. As far as he knew, he was the only one who used the computer to chat with Mandy. He knew Mandy was under 18 and said he was the one who contacted her.

Acuna then told Fickett Mandy's parents "found her shit on the computer, found out she's . . . running away" and that they had "no idea" where she was. Fickett replied he was not taking her anywhere, "I was not . . . kidnapping her, trying to take her away from her parents . . . ." At trial, Acuna testified, this was a common interrogation technique—to present a suspect with "a serious crime or outrageous story knowing that's not true" because sometimes the person will "be more forthcoming as to what really happened" i.e., to deny the serious allegation, the person gives more information as to exactly what their participation was.

Acuna then told Fickett he had a printout of Fickett's chat with Mandy, during which she had told him she was 13 years old. Fickett replied it was not "morally right," but he continued to deny talking about intercourse, and denied having sex with underage girls. Fickett said Mandy looked older than 13 in her picture—maybe 17. Fickett then conceded he wanted to "do more," i.e. kiss and touch Mandy, touch her genitals, and possibly engage in oral sex, and he had arranged to pick up Mandy at the 7-Eleven.

Leatherman interrupted the interview and asked Fickett if he had contacted other young girls. Fickett said he had chatted online with a woman named "Jess" he had met on Craigslist, whom he believed was 15 years old, and he sent her a picture of his penis from his cellphone. Acuna asked Fickett for passwords for his online accounts, which Fickett gave. At the conclusion of this interview, Fickett was formally arrested and given his *Miranda* warnings.

Defense's Psychological Expert

Fickett presented testimony of a forensic psychologist trained in the area of deviant sexual interests. Based on her psychological testing, she opined Fickett did not have any deviant sexual interest. She believed Fickett had a normal heterosexual male interest pattern in adult and late adolescent females. She explained that while a sexual interest in adolescents could be considered normal, it would not be normal for a 31-year-old man to have a sexual relationship with a 13-year-old girl. "'Because adolescents are part of a normal male heterosexual interest pattern, [Fickett's] interest is not considered deviant; however, his crossing the boundaries from interest to intent appears to be the issue.'"

Charges, Verdicts, Sentence

Fickett was charged with, and the jury was instructed on, contacting or communicating with a minor, or attempting to contact or communicate with a minor, with intent to commit lewd conduct (§ 288.3, subd. (a)) (count 1); attempted lewd conduct with a child under age 14 (§§ 288, subd. (a), 664, subd. (a)) (count 2); and arranging a meeting with a minor to engage in lewd or lascivious behavior (§ 288.4, subd. (b)) (count 3). The jury found Fickett guilty on all three counts as charged. Fickett was placed on formal probation for five years. He was ordered to spend 270 days in jail and register as a sex offender (§ 290).

DISCUSSION

1. Miranda

Fickett contends the court prejudicially erred by admitting his statements made to Acuna during the 7-Eleven store parking lot interview before his formal arrest because he was not given his *Miranda* warnings. We reject his contention.

a. Background

We begin with the relevant proceedings. Before the trial began, the court held an Evidence Code section 402 hearing on Fickett's motion to exclude his pre-arrest statements to police. The trial court stated it had listened to the audio recording and had read the written transcript of the interview.

Fay testified police were aware the person who conducted the online chat with Leatherman, posing as 13-year-old Mandy, was coming to meet Mandy at the prearranged location, and his name was Andrew Fickett. Leatherman had given Fay a description of Fickett's car and told Fay and his partner, Carringer, to detain Fickett in the parking lot. The street level parking lot was visible to the entire intersection. Fay and Carringer were in plain clothes, wearing black vests with the word "Police" printed on the front and back, and wearing their gun belts. Fay and Carringer were in an unmarked police vehicle, with no overhead lights on it. Fay testified that usually he would position his police vehicle behind the specific car to block it from backing out of the parking stall, but he could not recall if he did so on this occasion.

Fay got out of his car, walked to Fickett's car, identified himself, and asked Fickett to step out of his car. The officers did not draw their guns, or handcuff or use physical force against Fickett. Fay did not tell Fickett he was under arrest or why he was being detained, nor did he tell Fickett he was free to leave. Fay asked Fickett to sit on the curb and wait until the lead investigator arrived. He did not ask Fickett any questions. During this time, Fickett gave his consent to a search of his car. Fay testified there were a total of five officers involved in the investigation and who were in the area of the 7-Eleven

parking lot during Fickett's detention. A police transport unit arrived near the conclusion of the detention.

Acuna, the lead investigator, testified he arrived a minute or two after Fay initially detained Fickett. When he arrived, Fickett was sitting on a curb in the parking lot. Acuna, also in plain clothes wearing a police vest and gun belt, identified himself to Fickett. Acuna did not use any force or yell or scream at Fickett. He asked Fickett to go over to a quieter shaded part of the parking lot, still in full view of the street, so he would "feel more at ease." Acuna did not tell Fickett he was under arrest but said he was there to talk to Fickett and get some information. They were standing face to face during the interview. Fickett was never more than 10 yards away from his car.

Acuna and Fickett spoke alone for approximately 13 minutes. Acuna testified Fickett was not in custody at that point. His sole purpose in that part of the conversation "was to find out if [Fickett] was involved in the Internet chat line talking to the undercover officer just by asking him questions. . . . [He] just wanted to see if [they] had the right person contacted. So, to eliminate any other possible suspects, I wanted to make sure we had the right person." Although Acuna had been conducting surveillance of Fickett at his home in Hollywood and followed him to Anaheim, Acuna did not formally arrest Fickett until after he interviewed him, "Because in my mind I still wasn't certain this was the same person that was communicating via computer with [Mandy]. It could have been somebody else, associate of his, a friend, family member. So at this point I'm not a hundred percent sure that we have the right person . . . ." Acuna denied he was attempting to obtain incriminating statements from Fickett, but he agreed that he knew if he obtained information it could be used against Fickett.

After about 13 minutes, Leatherman interrupted and Acuna spoke with her briefly. He then had a further, very short conversation with Fickett. At one point, another officer "walked over." Acuna then placed Fickett under arrest, handcuffed him, and read him his *Miranda* rights.

In denying Fickett's motion to exclude his prearrest statements, the trial court found that based on the totality of the circumstances Fickett was not in custody during the interview with Acuna. The court specifically referenced having listened to the tape recording of the interview finding, "It does appear to be casual. There are no obvious threats. The officer is in fact investigating the case." The trial court first focused on Acuna's questions to Fickett about "whether any other people had access to [his] computer[,]" finding this showed Acuna was investigating, making sure police were talking to the right person." Acuna knew about the photograph of Mandy, and asked Fickett how old she looked to him. Fickett "put her at under the age of 18" and Acuna asked Fickett other questions about what he had meant when he wrote certain things—again showing Acuna "was still in the investigative stages." The court found it was "a reasonably brief detention for the purpose of asking questions." The trial court found it important Fickett "was extremely cooperative and seemed to be fearful that anything that they had could be misinterpreted." The trial court found the actions taken by the officers were reasonable and "brief considering the circumstances of the contact[,]" and it "was not a custodial interrogation that would have required *Miranda*." The court agreed the police had deliberately deceived Fickett by indicating the minor with whom he had communicated may have run away from home. The court stated, however, it "didn't pay much attention to that," "I don't think that that is of concern to the court," and the officer's actions were "reasonable under the circumstances."

b. Analysis

Fickett contends statements he made to Acuna during the parking lot interview before his formal arrest should have been excluded from evidence because they were taken in violation of *Miranda*. We find no error.

A person interrogated by law enforcement officers after being taken into custody must first be warned he has a right to remain silent, that any statement he does make may be used as evidence against him, and he has a right to the presence of an attorney,

either retained or appointed. (*Miranda*, *supra*, 384 U.S. at p. 445.) Statements taken in violation of this rule are generally inadmissible. (*Stansbury v. California* (1994) 511 U.S. 318, 322.) *Miranda* is premised on the perception that interrogation of a suspect in police custody is inherently coercive. To insure that any statement the suspect makes in that setting is a product of his free will, the United States Supreme Court held the interrogation must be preceded by the essential procedural safeguards in the form of the warnings.

"While the term 'interrogation' refers to any words or actions on the part of police that are reasonably likely to elicit an incriminating response, it does not extend to inquiries . . . that are 'essentially "limited to the purpose of identifying a person found under suspicious circumstances or near the scene of a recent crime[.]"' [Citation.] Likewise, the term 'custody' generally does not include 'a temporary detention for investigation' where an officer detains a person to ask a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions. [Citation.]" (*People v. Farnam* (2002) 28 Cal.4th 107, 180.)

The "ultimate inquiry" for custody for *Miranda* is "simply whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest. [Citation.]" (*California v. Beheler* (1983) 463 U.S. 1121, 1125.) Absent a formal arrest, custody is determined by objectively looking at all the surrounding circumstances and determining whether a reasonable person in the suspect's position would believe he was in police custody to the degree associated with a formal arrest. (*Yarborough v. Alvarado* (2004) 541 U.S. 652, 662-663; *Berkemer v. McCarty* (1984) 468 U.S. 420, 442 (*Berkemer*); *People v. Stansbury* (1995) 9 Cal.4th 824, 830 (*Stansbury*); *People v. Pilster* (2006) 138 Cal.App.4th 1395, 1403 ["Would a reasonable person interpret the restraints used by the police as tantamount to a formal arrest?"].)

"Whether a defendant was in custody for *Miranda* purposes is a mixed question of law and fact. [Citation.] When reviewing a trial court's determination that a defendant did not undergo custodial interrogation, an appellate court must 'apply a

deferential substantial evidence standard' [citation] to the trial court's factual findings regarding the circumstances surrounding the interrogation, and it must independently decide whether, given those circumstances, 'a reasonable person in [the] defendant's position would have felt free to end the questioning and leave' [citation]." (*People v. Leonard* (2007) 40 Cal.4th 1370, 1400; see also *Thompson v. Keohane* (1995) 516 U.S. 99, 112.)

No single factor is determinative in deciding whether a suspect was in custody, and we consider them as a whole. (*People v. Forster* (1994) 29 Cal.App.4th 1746, 1753.) "Courts have identified a variety of relevant circumstances. Among them are whether contact with law enforcement was initiated by the police or the person interrogated, and if by the police, whether the person voluntarily agreed to an interview; whether the express purpose of the interview was to question the person as a witness or a suspect; where the interview took place; whether police informed the person that he or she was under arrest or in custody; whether they informed the person that he or she was free to terminate the interview and leave at any time and/or whether the person's conduct indicated an awareness of such freedom; whether there were restrictions on the person's freedom of movement during the interview; how long the interrogation lasted; how many police officers participated; whether they dominated and controlled the course of the interrogation; whether they manifested a belief that the person was culpable and they had evidence to prove it; whether the police were aggressive, confrontational, and/or accusatory; whether the police used interrogation techniques to pressure the suspect; and whether the person was arrested at the end of the interrogation. [Citations.]" (*People v. Aguilera* (1996) 51 Cal.App.4th 1151, 1162 (*Aguilera*).)

Fickett primarily argues he was in custody for *Miranda* purposes during the parking lot interview because at the time he was detained, the police already had all the facts necessary to arrest him for the offenses with which he was charged. He argues, "*Miranda* applies, at the very latest, when the police have probable cause to make an arrest or bring an accusation against the individual, because at that point the police cannot be expected to

permit the suspect to leave." (Underscore omitted.) In making this argument, Fickett relies on several older cases. For example, Fickett cites *People v. Chaney* (1965) 63 Cal.2d 767, 771, in which our Supreme Court held warnings were required because "the investigating officer was fully aware of 'what had happened' constituting the crime and was further aware of those persons who were implicated, including defendant." (See also *People v. Furnish* (1965) 63 Cal.2d 511, 516 [evidence of guilt already in possession of police a factor in determining whether investigation had reached accusatory stage].)

Fickett also cites *People v. Ceccone* (1968) 260 Cal.App.2d 886, 892-893 (*Ceccone*), which held an interrogation became custodial when it became focused on the person being interrogated. "Once the investigating officer has probable cause to believe that the person being detained for questioning has committed an offense, the officer cannot be expected to permit the suspect to leave. At that point, at the latest, the interrogation becomes custodial and prior to any further questioning the suspect must be warned of his rights. [Citation.]" (*Ibid.*) (See also *People v. Wright* (1969) 273 Cal.App.2d 325, 333 ["custodial stage of field interrogation arises, 'at the latest,' at the point when the investigating officer [citation] has probable cause to believe that the person being questioned has committed an offense"]; *People v. Manis* (1969) 268 Cal.App.2d 653, 670 [explaining "*Ceccone*[, *supra,* 260 Cal.App.2d 886] followed the English practice, which permits a police officer to question a suspect until such time as the officer acquires enough evidence to prefer a criminal charge, at which time he must then deliver a warning"].)

But Fickett's argument is not premised upon the *current* state of the law stated by our Supreme Court and the United States Supreme Court. "[T]he uncommunicated subjective impressions of the police regarding defendant's custodial status" are "irrelevant." (*Stansbury, supra*, 9 Cal.4th at p. 830.) "[E]vidence of the officer's subjective suspicions or beliefs is relevant only 'if the officer's views or beliefs were somehow manifested to the individual under interrogation and would have affected how a reasonable person in that position would perceive his or her freedom to leave' or if such evidence is 'relevant in

testing the credibility of [the officer's] account of what happened during an interrogation . . . .' [Citation.]" (*Ibid*., fn. omitted, quoting *Stansbury v. California*, *supra*, 511 U.S. at p. 325; See also *Berkemer*, *supra*, 468 U.S. at p. 442 ["A policeman's unarticulated plan has no bearing on the question whether a suspect was 'in custody' at a particular time; the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation"]; *People v. Vasquez* (1993) 14 Cal.App.4th 1158, 1164 [being focus of official investigation irrelevant to custody unless communicated to defendant].)

Taken as a whole, we do not find Acuna's interview of Fickett was custodial. The interview was very brief—13 minutes in total. The detention took place in daylight, in a street level parking lot, in full view of the public. The officers were in plain clothes, no weapons were drawn, and Fickett was not in handcuffs. When Fay initially approached Fickett, Fickett was very cooperative, sat on the curb, and readily gave consent to a search of his car. When Acuna arrived just two minutes later, Fickett readily agreed to answer questions. Acuna moved Fickett to a quieter part of the parking lot, in the shade so he would be more comfortable, and spoke to him alone. Acuna and Fickett were standing face to face as they talked. The trial court listened to the audio recording of the interview finding it was "casual" in tone, there were no "obvious threat[s]" and Fickett "'was extremely cooperative'" during the interview. Although Fickett was not told he was free to leave, he was not pressured or coerced to remain. And although Fay might have positioned his car behind Fickett's parked car in the 7-Eleven parking lot that would not necessarily compel a conclusion Fickett was in custody when Acuna interviewed him outside the car in another part of the parking lot. In short, on balance, the facts support the trial court's conclusion Fickett was not in custody during the brief interview.

Further, even were we to agree Fickett's statements to Acuna were improperly admitted into evidence, the error was harmless beyond a reasonable doubt. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 309 [*Miranda* errors are subject to harmless error analysis].) Fickett argues he was prejudiced because in the interview he confirmed he used

the username "bendoverjohn;" chatted with Mandy; drove from Hollywood to Anaheim to "hang out" with Mandy; and wanted to touch, kiss, and "do more" with Mandy. Fickett also admitted he communicated online with another girl he understood to be only 15 years old and sent her a photograph of his penis via his cellphone. Also, Fickett made certain denials during the interview that were contradicted by the transcript of his online "chat." But we conclude the evidence in the form of the transcripts of the online chats and Fickett's text messages to Mandy, combined with the officers' observations was so overwhelming that it is not reasonably probable Fickett would have been acquitted in the absence of the interview statements.

Fickett was convicted of contacting a minor with the intent to commit a sexual offense, attempted lewd conduct with a child under age 14, and arranging a meeting with a minor to engage in lewd or lascivious behavior. There was overwhelming evidence Fickett was "bendoverjohn," and he understood he was communicating and arranging to meet with a minor for the purpose of committing a sexual offense. There were the extensive sex-laced online chats and texts between Leatherman, who repeatedly identified herself as 13-year-old Mandy, with someone going by the user name "bendoverjohn." In those chats and texts, "bendoverjohn" described various sex acts he wanted to perform with young Mandy and arranged to pick her up the next day to bring her to his house to "hang out." Mandy sent her picture to "bendoverjohn" who acknowledged she looked young—older than 13, but not much older. In the course of their chats, "bendoverjohn" made numerous references to Mandy being only 13 years old and their needing to keep the meeting a secret because he did not want to go to jail for "making out" with her. In the course of the chats, "bendoverjohn" identified himself as a 31-year-old male living in Hollywood, gave Mandy his first name "Andrew," his cellphone number, and sent her his picture. That gave officers ample information from which they were quickly able to identify "bendoverjohn" through DMV records as "Andrew Fickett," a 31-year-old male living in Hollywood. The next morning, Fickett texted Mandy telling her that he was on his way to their rendezvous point

driving a silver Corolla with Texas license plates. Acuna observed Fickett leave his residence in Hollywood and followed him to the designated 7-Eleven parking lot in Anaheim; Fickett was in a silver Corolla with Texas license plates.

Thus, even without the interview statements, there was overwhelming evidence Fickett was the person communicating with Mandy, who he understood to be a minor, that he arranged a meeting with Mandy, and that he went to that meeting intending to commit a sexual offense. The interview statements merely confirmed what the other evidence showed. The only new revelation from the interview was that Fickett had once sent a picture of his penis to girl he thought was only 15 years old. While that information certainly would not have endeared Fickett to the jury, the reference to it was brief, and it was never mentioned by the prosecution in closing argument. Therefore, even if its admission was erroneous it does not undermine our conclusion that any error was harmless beyond a reasonable doubt.

B. No Actual Minor Victim: Section 288.3

Fickett contends he could not be convicted of violating section 288.3, subdivision (a), because that offense requires the involvement of an *actual* minor, a fact not present in this case. We reject his contention.

Section 288.3, subdivision (a), provides: "Every person who contacts or communicates with a minor, or attempts to contact or communicate with a minor, who knows or reasonably should know that the person is a minor, with intent to commit [certain specified sex offenses] involving the minor shall be punished by imprisonment in the state prison for the term prescribed for an attempt to commit the intended offense." (See generally *People v. Keister* (2011) 198 Cal.App.4th 442 [rejecting various challenges to constitutionality of § 288.3].)

Fickett contends section 288.3 should be interpreted to require there be an actual minor victim—an adult posing as a minor does not suffice. He contrasts the language of section 288.3, subdivision (a), with language of section 288.4, subdivision (a)(1) (of

which he was also convicted), which makes clear the "minor" need not be an actual minor by providing, "Every person who, motivated by an unnatural or abnormal sexual interest in children, arranges a meeting with a minor *or a person he or she believes to be a minor* for the purpose of [committing certain specified sex offenses] shall be punished by [a fine and/or imprisonment]." (Italics added.)

We reject Fickett's interpretation of section 288.3, subdivision (a). That section explicitly indicates a defendant is guilty if he or she "*attempts* to contact or communicate with a minor" with the requisite mental state. (Italics added.) The lack of an actual minor is not a defense to an attempt to commit a sex offense against a minor. (See *Hatch v. Superior Court* (2000) 80 Cal.App.4th 170, 185-186 [defendant may be found guilty of attempt to commit violations of §§ 288, subd. (a), and 288.2, subd. (a), even though intended victims were not in fact under 14 years of age]; *People v. Reed* (1996) 53 Cal.App.4th 389, 396 [defendant guilty of attempted lewd conduct with regard to imaginary child victims created by police officer; "'factual impossibility is not a defense to a charge of attempt'"].)

Fickett's argument that section 288.3, subdivision (a), is different from other sex offense statutes because it requires the defendant be a person "who knows or reasonably should know that the person is a minor" is unavailing. This language simply makes clear that the offense does not impose strict liability upon someone who does not know and has no reason to know that the person they are communicating with is a minor.

Thus, under the correct interpretation of the statute, there is substantial evidence supporting Fickett's conviction under section 288.3, subdivision (a), because Fickett believed he was communicating with a 13-year-old girl. Prior to the October 2011 incidents, Fickett had chatted several times with "yungandfun13," and she told him that she was 13 years old. In the October 24, 2011, chats Mandy told Fickett she was 13 years old, and he acknowledged her age several times. Mandy sent Fickett an age regressed picture and he responded that she looked older than 13, but not by much. He acknowledged that at

age 13, Mandy could not drive. He offered to come pick her up and said it would be better if they "hung out at my place [because it] might look a little strange if we were out in public together." He talked to Mandy about not telling anyone they were meeting because "I'd like to stay out of jail[,]" He said "if we make out I break the law" and so Mandy would be his "naughty little secret." Fickett was clearly attempting to communicate with a minor, and the lack of an actual minor does not require

reversal of his conviction for violating section 288.3, subdivision (a).

DISPOSITION

The judgment is affirmed.

O'LEARY, P. J.

WE CONCUR:

BEDSWORTH, J.

ARONSON, J.